

The respondent and its insurance carrier (respondent) raised the following issues on review: (1) whether the claimant's accidental injury arose out of and in the course of employment; (2) whether the claimant gave notice; (3) whether the claimant is entitled to outstanding medical and temporary total disability benefits; and, (4) nature and extent of claimant's disability.

Conversely, claimant requests the Board to affirm the ALJ's Award in all respects.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations and briefs filed by the parties, and having considered the parties' oral arguments, the Board finds the ALJ's Award should be affirmed.

The Board finds the ALJ's findings and conclusions are accurate and supported by the law and the facts contained in the record. It is not necessary to repeat those findings and conclusions in this Order. The Board approves those findings and conclusions and adopts them as its own to the extent that they are not inconsistent with the findings and conclusions expressed herein.

Respondent argues claimant failed to establish he suffered accidental injury arising out of and in the course of his employment. Claimant described his job duties operating a machine for respondent which required intensive use of his right hand. Claimant noted that as he performed his job duties he began to experience daily pain and numbness in his right hand. Claimant's right hand was cold and when he told his supervisor about his hand he was advised to have it checked. Medical examination and testing confirmed carpal tunnel in claimant's right hand. Claimant denied he engaged in any other activities that could account for the symptoms in his hand because work left little time for any other activities. The Board adopts the ALJ's finding claimant has met his burden of proof to establish he suffered accidental injury arising out of and in the course of his employment.

Respondent next contends claimant failed to give timely notice of the accident and in conjunction with this argument contends in its brief that claimant has not and did not allege a series of accidents.

The initial application for hearing filed with the Division of Workers Compensation on November 22, 2000, alleged a single date of accident of August 15, 2000. However, on December 21, 2000, claimant sent respondent a notice of intent to file for preliminary hearing, and specifically referred to a date of accident of August 15, 2000, through November 22, 2000. The application for preliminary hearing filed with the Division of Workers Compensation on January 3, 2001, alleged a series of accidents from August 15, 2000, through November 22, 2000. At the regular hearing during the stipulations, it was noted claimant alleged a series of accidents from August 15, 2000, through November 22, 2000. Based upon the foregoing uncontroverted evidence contained in the administrative file the Board concludes the claimant did allege a series of accidents.

The ALJ determined claimant suffered a series of accidents which culminated on his last day of work before he had surgery to correct the carpal tunnel syndrome in his right

hand.<sup>1</sup> The last day worked before surgery was November 22, 2000, and the ALJ determined that date was the accident date. The Board agrees and adopts the ALJ's analysis and determination of the November 22, 2000, accident date. However, it must be noted that in the ALJ's opinion, under the final heading of Award, the accident date is listed as August 15, 2000. Accordingly, the Board modifies that finding to correct the date of accident to November 22, 2000, as determined by the ALJ in the body of the decision.

The primary contention of the respondent is that claimant failed to provide timely notice of the accident. It is uncontradicted that claimant advised his supervisor of the symptoms he was experiencing in his hand sometime before November 22, 2000. After claimant's condition was diagnosed and surgery recommended, claimant met with his supervisor and respondent's plant manager on November 22, 2000. As detailed by the ALJ, the parties differ on the specifics of the conversation. But it was clear from the supervisor's and plant manager's notes from the meeting that they were aware of the nature of claimant's injury and its connection to work. Moreover, the plant manager's notes specifically mention there could be a connection between claimant's carpal tunnel and his work. Lastly, the plant manager told the supervisor to commemorate his version of events and the meeting because claimant wanted to file a workers compensation claim against the respondent.<sup>2</sup> The Board adopts the ALJ's analysis and determination that claimant gave timely notice.

Respondent further implies claimant should be estopped from claiming a workers compensation injury because in order to obtain short-term disability benefits, claimant filled out forms noting he had not had an accident. Respondent argues it is inconsistent to seek short-term disability benefits, claiming there was no accident and then seek workers compensation benefits for the same condition.

The claimant testified that at the meeting with the plant manager to discuss the forthcoming surgery, the plant manager had reacted by throwing a piece of paper and stating another accident could not be afforded. Although the plant manager denied that was his response he did admit there was plant-wide pressure to reduce accidents. Claimant felt obligated or encouraged to submit his bills to his health insurance carrier instead of filing a workers compensation claim. Because claimant would have no income while recuperating from the recommended surgery he also applied for short-term disability payments through respondent's office.

On the application for short-term disability the form had the question "Is claim related to an accident?" The claimant marked the "No" box in response. However, the

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<sup>1</sup> See *Durham v. Cessna Aircraft Co.*, 24 Kan. App. 2d 334, 945 P.2d 8 (1997).

<sup>2</sup> Palmerin Depo. at 8,13.

form also contained the question “Is absence work related?” The claimant did not mark either the no or yes response to this question and instead did not respond to the question.<sup>3</sup>

It is not unusual that a lay person, unfamiliar with workers compensation law, would not equate the term accident with repetitive or mini-trauma injuries, or that a lay person would define an accident as a single traumatic event. Moreover, the record shows respondent was aware of the work related nature of claimant’s condition and so did not rely upon claimant’s statements in the application for disability form. Accordingly, under the facts of this case, the Board concludes the manner in which the claimant filled out the short-term disability form does not equate to an inconsistent position nor estop claimant from seeking workers compensation benefits.

In *Marley v. M. Bruenger & Co. Inc.*, 27 Kan. App.2d 501, 504, 6 P.3d 421, rev. denied 269 Kan. \_\_\_\_ (2000) it was noted:

‘ . . . Equitable estoppel is the effect of the voluntary conduct of a person whereby he is precluded, both at law and in equity, from asserting rights against another person relying on such conduct. A party asserting equitable estoppel must show that another party, by its acts, representations, admissions, or silence when it had a duty to speak, induced it to believe certain facts existed. It must also show it rightfully relied and acted upon such belief and would now be prejudiced if the other party were permitted to deny the existence of such facts. . . .’ (*United American State Bank & Trust Co. v. Wild West Chrysler Plymouth, Inc.*, 221 Kan. 523, 527, 561 P.2d 792 [1977].)

Applying the foregoing standard to the facts in this case, an argument can be made that respondent should be estopped from using the short-term disability application as evidence against claimant’s workers compensation claim. Herein, claimant felt compelled to forego filing a workers compensation claim because of the impression he had that the respondent could not afford any more accident claims. Clearly, on this occasion claimant felt some pressure to not file a workers compensation claim because in the past he had reported a work-related broken finger. The plant manager admitted there was plant-wide pressure to reduce accidents and there were daily meetings on the subject. Claimant relied upon his impression from the meeting that he should not file a workers compensation claim and sought treatment with his personal physician. Claimant further sought short-term disability when his physician took him off work after his surgery.

Although the plant manager noted the carpal tunnel could be work-related and told claimant’s supervisor the claimant wanted to file a workers compensation claim against the respondent, neither of them offered to provide claimant medical benefits. Moreover,

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<sup>3</sup> R.H. Trans., Resp. Ex. E.

although the plant manager was aware claimant intended to file for short term disability,<sup>4</sup> he did not attempt to dissuade claimant. Respondent now seeks to deny the claim because claimant relied and acted upon respondent's silence.

The Board concludes the claimant's answers to questions on a form completed to request short-term disability, based upon his belief that he should not file a workers compensation claim, coupled with respondent's knowledge and conduct, do not preclude claimant from seeking workers compensation benefits.

On the issue of nature and extent, the Board adopts the ALJ's findings, based on Dr. Lanny Harris' uncontradicted opinion, that claimant suffered a 21 percent permanent partial impairment to the right upper extremity. The Board is not unmindful that claimant noted his condition continued to improve, nonetheless, the only evidence regarding claimant's impairment was provided by Dr. Harris. Lastly, the Board adopts and affirms the ALJ's analysis regarding claimant's entitlement to temporary total disability and medical compensation.

### **AWARD**

**WHEREFORE**, the Award of Administrative Law Judge Julie A.N. Sample dated October 24, 2001, is clarified to reflect that the ending date of the series of accidents, November 22, 2000, will be treated as the date of accident for award purposes and is otherwise affirmed in all other respects.

### **IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of February 2003.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

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<sup>4</sup> Whitaker Depo., Ex. 1.

c: Robert W. Harris, Attorney for Claimant  
Timothy G. Lutz, Attorney for Respondent  
Julie A.N. Sample, Administrative Law Judge  
Director, Division of Workers Compensation